Office-Supreme Court, U.S.
FILED
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No. 80-2071.

In the Supreme Court of the United States.

OCTOBER TERM, 1980.

ROSLINDALE CO-OPERATIVE BANK, ET AL.,
PETITIONERS,

v.

CAROL S. GREENWALD, ET AL.,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Brief of Central Bank Respondents in Opposition.

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The respondents The Co-operative Central Bank and its individual officers and directors, defendants below, submit this brief in opposition to the petition for certiorari filed by the petitioners, Roslindale Co-operative Bank and its individual officers and directors, and respectfully request that the petition for certiorari be denied.

Counterstatement of Questions Presented.

1. Whether the Court of Appeals and the District Court were correct in holding that, under Massachusetts law, the opportunity afforded the plaintiffs to obtain judicial review of the defendant Bank Commissioner's decision to appoint a receiver for the plaintiff Roslindale Co-operative Bank satisfied due process?
2. Whether the Court of Appeals and the District Court were correct in holding that Mass. G.L. c. 167, § 5, the bank officer removal statute, is on its face constitutional?
3. Whether the Court of Appeals and the District Court were correct in holding that the proceedings initiated by the defendant Commissioner of Banks to remove certain of the plaintiffs from their offices in the plaintiff Bank pursuant to Mass. G.L. c. 167, § 5 satisfied due process?

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Jurisdiction.

The judgment of the United States Court of Appeals for the First Circuit was entered on November 21, 1980, affirming a judgment of the United States District Court for the District of Massachusetts dated April 16, 1980. Upon consideration of various post-decision motions, the First Circuit entered a final order on February 11, 1981 denying the petitioners' motion to recall mandate. On April 7, 1981, Mr. Justice Brennan signed an order extending the time for the petitioners to file a petition for a writ of certiorari to and including June 7, 1981.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Opinions Below.

The amended opinion of the United States Court of Appeals for the First Circuit (Pet. 5a) is reported at 638 F.2d 258 (1981). The opinion of the United States District Court for the District of Massachusetts on the defendants' motions to dismiss (Pet. 15a) is reported at 481 F.Supp. 749 (1979). A subsequent opinion of the United States District Court for the District of Massachusetts on the defendant Greenwald's motion for summary judgment is unreported (Pet. 11a).

Statutes Involved.

The statutory provisions involved are set forth in Appendix A to this brief.

Counterstatement of the Case.

This purported civil rights action was brought by the petitioners Roslindale Co-operative Bank and eleven of its officers and directors (the "petitioners") against the Massachusetts Commissioner of Banks, The Co-operative Central Bank (the statutory deposit insurer and receiver of all co-operative banks), and twenty-odd other individuals for actions arising out of the Commissioner's decision of October 28, 1977 to put the management of Roslindale's affairs under the statutory receivership of the Central Bank. Mass. G.L. c. 170 App. § 2-4.[1] During the pendency of this action, the Commissioner commenced independent proceedings to remove and did remove four of the individual petitioners (all members of the Security [*i.e.*, loan approval] Committee of Roslindale's Board of Directors) from office pursuant to Mass. G.L. c. 167, § 5 for unsafe and unsound banking practices.

The petitioners filed three amendments to their complaint — all of which were allowed by the District Court on July 2, 1979 (Pet. 21a). On December 7, 1979, the District Court granted in their entirety the motions to dismiss which had been filed by all defendants except for certain claims made by four individual petitioners against former Commissioner of Banks Greenwald (Pet. 15a-28a). Greenwald then answered the remaining claims and filed a motion for summary judgment accompanied by an affidavit and extensive exhibits. On

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[1] There are two special acts of the Massachusetts Legislature relevant to this petition. Mass. St. 1932, c. 45, the "Central Bank Act," and Mass. St. 1934, c. 73, the "Share Insurance Fund Act." The petitioners and the Courts below have all cited to these acts as they are reprinted in the West Massachusetts General Laws Annotated where they are codified respectively as Mass. G.L. c. 170, App., §§ 1-1 through 1-11 and Mass. G.L. c. 170 App., §§ 2-1 through 2-16. This brief will cite to those acts as reprinted in the West Annotated Massachusetts statutes.

March 25, 1981, the District Court granted Greenwald's motion for summary judgment (Pet. 11a-14a). After a final judgment was entered in the District Court on April 16, 1980, an appeal to the First Circuit followed. The First Circuit affirmed the decision of the District Court in an unpublished opinion issued November 21, 1980 (Pet. 5a). After reconsideration of its decision prompted by a request from the petitioners, the First Circuit made a minor amendment to its decision and released its revised opinion for publication on January 8, 1980 (Pet. 5a-10a). That decision held that: (1) the Massachusetts co-operative bank receivership law did not unconstitutionally violate due process of law because any decision of the Commissioner of Banks to appoint a receiver for the petitioner Roslindale Co-operative Bank was subject to adequate judicial review under other provisions of Massachusetts law; (2) the Massachusetts bank director removal statute, Mass. G.L. c. 167, § 5, on its face did not unconstitutionally violate due process of law; and (3) the proceedings by which the defendant Commissioner of Banks removed four of the individual petitioners from office under Mass. G.L. c. 167, § 5 were constitutionally adequate and not violative of due process.

Counterstatement of Facts.

The underlying facts relevant to this petition are relatively simple and relate to two largely separate chains of events. The petitioner Roslindale Co-operative Bank is a co-operative bank organized under Mass. G.L. c. 170.[2] Albert G. Tobin is its president and it has (or had) twelve individual directors

[2] Massachusetts co-operative banks are state-chartered, mutually owned thrift institutions. Their management is elected by their respective shareholders. In most other states, such institutions are denominated savings and loan associations.

(Pet. 6a).[3] On October 28, 1977, Carol Greenwald, then the Massachusetts Commissioner of Banks, acting pursuant to Mass. G.L. c. 170 App., § 2-4, certified to The Co-operative Central Bank (the "Central Bank") that it appeared to her "unsafe and inexpedient for the Roslindale Co-operative Bank to continue to transact its business" (Pet. 5a). As provided by that statute, the Central Bank promptly took possession and control of the Roslindale Bank's property and business and assumed the managerial duties of its officers and directors (Pet. 6a). On November 2, 1977, the petitioners were notified by letter of both the Commissioner's and the Central Bank's actions (Pet. 6a). The Roslindale Co-operative Bank and its president, A. Tobin, took an appeal of the Commissioner's actions to the Massachusetts courts which was dismissed without prejudice "on valid non-pretextual grounds" (Pet. 6a, 8a). *Tobin* v. *Commissioner of Banks*, 377 Mass. 909, 386 N.E.2d 1246 (1979). At the present, the Roslindale Bank remains under the control of the Central Bank.

Approximately one year after the certification, the Commissioner began administrative proceedings to remove five directors from the Roslindale Bank's Board of Directors for engaging in unsafe and unsound banking practices as provided by Mass. G.L. c. 167, § 5 (Pet. 6a). One of the five then voluntarily resigned (Pet. 6a). The Commissioner held a show cause hearing in connection with this removal proceeding which, as provided by statute, was also attended by a three-member board consisting of designees of the Attorney General, the State Treasurer and the Commissioner of Revenue (Pet. 6a). The complete thirteen-volume transcript of that hearing was filed with the District Court by the Commissioner (Pet. 12a). The four individual petitioners received at least a

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[3] As discussed below, four directors have been removed and one voluntarily resigned prior to the initiation of removal proceedings pursuant to Mass. G.L. c. 167, § 5.

month's formal notice of the hearing and were given a bill of particulars even before then (Pet. 9a). After a postponement made at the directors' request, the hearing began on December 8, 1978, and lasted for ten (10) days (Pet. 13a). Much of the first six days was taken up by the four individual petitioners' cross-examination of the witnesses produced by the State Banking Division and by lengthy diatribes charging persecution of them by the Division (Pet. 9a, 12a-13a). During the remaining four days the plaintiffs called five witnesses. The hearing closed with rebuttal testimony by a Banking Division witness and closing arguments by both sides (Pet. 12a). On January 4, 1979, the Commissioner of Banks issued a 56-page decision summarizing the evidence against the four directors and citing numerous infractions, including violation of state banking laws, the conducting of the Roslindale Bank's business in an unsafe and unsound manner, negligence in the performance of their duties as directors, and use of their official positions in a manner contrary to the Bank's interest (Pet. 6a). She therefore removed all four as directors of the Roslindale Bank (Pet. 6a).

The Commissioner's decision was upheld by the statutory board in an opinion issued a week later (Pet. 6a).[4]

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[4] Although not apparent from the appendices to the petition, the four individual petitioners have claimed an appeal of the Commissioner's and the Board's removal decision to the state court. Mass. G.L. c. 167, § 5. That appeal is presently pending. *Tobin* v. *Commissioner of Banks*, Suffolk Superior Court, Civil Action No. 33144. The petitioners have also filed a declaratory judgment action to obtain judicial review of the Commissioner's October 28, 1977 decision to certify Roslindale Co-operative to the Central Bank as unsafe. *Roslindale Co-operative Bank* v. *Greenwald*, Suffolk Superior Court, Civil Action No. 44846. That action is also pending in the state trial court.

Summary of Argument.

The Court of Appeals properly concluded that the availability of judicial review for a discretionary decision by the respondent Commissioner of Banks to appoint the respondent Central Bank receiver of the petitioner Roslindale Co-operative Bank adequately protected the petitioner Roslindale's constitutional right to due process of law (pp. 6-9). The Court also correctly ruled that (a) Mass. G.L. c. 167, § 5, the Massachusetts bank officer removal statute, was constitutionally adequate on its face and (b) the procedures used to remove four of the petitioners under that statute were constitutionally adequate (pp. 9-12).

Reasons for Denying the Writ.

I. THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW RAISED BY THE LOWER COURT DECISION WHICH SHOULD BE SETTLED BY THIS COURT.

A. *The Court of Appeals Properly Concluded that the Procedural Remedies Available to the Petitioner Roslindale Co-operative Bank in Connection with the Commissioner's Decision to Put it into Receivership Adequately Protects any Constitutional Rights Involved.*

Assuming, as did both courts below, that petitioner Roslindale Co-operative Bank has a constitutionally protected property interest in the management of its affairs, there are only two constitutional questions relating to the Commissioner's decision to appoint the Central Bank receiver of Roslindale's affairs. First, did the Bank have a constitutional right to a hearing prior to the receivership? Second, if there is no such right to a prior hearing, are the procedures available to the petitioner Roslindale under Massachusetts law to challenge the

receivership sufficiently protective of the petitioner Roslindale's due process rights?

The answer to the first question is simple. As the First Circuit noted:

> The Bank's claim that it was entitled to a hearing prior to certification is effectively disposed of by one of the authorities it cites. Fahey v. Mallonee, 1947, 332 U.S. 245, 253-54; Coffin Bros. v. Bennett, 1928, 277 U.S. 29; Federal Deposit Ins. Corp. v. American Bank Trust Shares, 4 Cir., 1980, 629 F.2d 951. The drastic consequences of bank failure or mismanagement and 'the impossibility of preserving credit during an investigation,' Fahey, ante, 332 U.S. at 253, call for prompt and decisive action and place this proceeding among the 'extraordinary situations' in which notice and hearing may be postponed until after seizure. Fuentes, ante, 407 U.S. at 90-91 & n.23.

(Pet. 8a.)

As to the second question, the answer is no more difficult. In a case involving the petitioners Roslindale and Albert Tobin, the Massachusetts Supreme Judicial Court held that Mass. G.L. c. 231A, "The Declaratory Judgment Act", afforded the petitioners a vehicle by which they could obtain judicial review of the Commissioner's decision to appoint the Central Bank as receiver of Roslindale's assets. *Tobin* v. *Commissioner of Banks*, 377 Mass. 909, 386 N.E.2d 1246 (1979). Relying on this opinion, both courts below concluded that the availability of judicial review pursuant to the Massachusetts Declaratory Judgment Act "meets all the requirements of due process in the context of bank certification." (Pet. 24a; Pet. 8a.[5])

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[5]For reasons known only to the petitioners, they did not pursue the declaratory judgment remedy which the Massachusetts Supreme Judicial

The availability of such judicial review, which would test the Commissioner's action against the statutory requirements for bank certification set out in Mass. G.L. c. 170 App., § 2-4, is fully adequate to protect any property interests belonging to the petitioners. *Fahey* v. *Mallonee*, 332 U.S. 245, 252-253 (1947); *Federal Deposit Insurance Corporation* v. *American Bank Trust Shares*, 629 F.2d 951 (4th Cir. 1980).

As the First Circuit correctly concluded:

> The availability of the statutory proceedings satisfied the requirements of due process. Federal Deposit Ins. Corp. v. American Bank Trust Shares, ante. We cannot be sympathetic to a party who elects to forego the hearing provided him, and then complains he received none. This is not a case of an invasion of plaintiffs' substantive rights, where they would have the opinion of seeking federal rather than state redress. Monroe v. Pape, 1961, 365 U.S. 167, 183. Rather, their complaint is lack of due process, viz., the absence of a hearing. Since a sufficiently timely hearing was available to them, they cannot bootstrap themselves into the federal court by failing to seek it.

(Pet. 8a-9a.)

The fact that the petitioners have apparently decided to voluntarily forego exercise of that right cannot serve to boot-

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Court said they had in its April, 1979 *Tobin* opinion until October, 1980 — some eighteen months later. See footnote 3, *supra*. Thus, the only reason why the petitioners have not had the judicial review or process which they claim they desire is due solely to their inability or unwillingness to file a proper declaratory judgment action in the state courts. The fact that they have done so since the time their appeal to the First Circuit was argued probably moots this petition.

strap them into a position to claim that they have been denied procedural due process. A number of other 42 U.S.C. § 1983 cases have held that persons asserting denial of procedural due process have an obligation to pursue available state procedures that might moot such a claim.[6] *See, e.g., Toney* v. *Reagan*, 467 F.2d 953, 956 (9th Cir. 1972); *Elmwood Properties, Inc.* v. *Conzelman*, 418 F.2d 1025, 1027 (7th Cir. 1969); *Randell* v. *Newark Housing Authority*, 384 F.2d 151, 156 (3d Cir. 1967); *Klotz* v. *Consolidated Edison Co. of New York, Inc.*, 386 F.Supp. 577, 586 (S.D. N.Y. 1974); *Light* v. *Blackwell*, 472 F.Supp. 333, 336 (E.D. Ark. 1979).

B. *The Court of Appeals Correctly Ruled that Mass. G.L. c. 167, § 5, "The Bank Removal Statute," was on its Face Constitutional.*

There can be no serious question that the procedural protections afforded the four removed director petitioners by statute, on their face, fully provide the directors with due process. *See Rodriguez de Quinonez* v. *Perez*, 596 F.2d 486, 491 (1st Cir.

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[6] The respondents do not argue that remedies must always be exhausted in a § 1983 case, although they note "the unsettled state of the law in this area." *Burns* v. *Sullivan*, 619 F.2d 99, 107 n.14 (1st Cir. 1980) comparing *Gibson* v. *Berryhill*, 411 U.S. 564, 574-575 (1973) with *Ellis* v. *Dyson*, 421 U.S. 426, 432-433 (1975). However, in a case where a plaintiff claims to have been denied procedural due process at a stage when procedural avenues are still open to him, the constitutional "injury" has not, in fact, yet occurred. *Toney* v. *Reagan*, *supra*, 467 F.2d at 956. In such cases, a plaintiff is obligated to avail himself of those remedies which may serve to moot his claim of lack of due process. Moreover, such a requirement is consistent with "recognition of the primacy of viable . . . dispute resolution mechanisms." *Burns* v. *Sullivan*, *supra* at 107 n.14. Furthermore, one must keep in mind that in enacting § 1983, the "Congressional purpose was not to replace state courts with federal ones, but was to provide a federal remedy for official misconduct in situations where the state procedures had proved inadequate." *Egner* v. *Texas City Independent School District*, 338 F.Supp. 931, 935 (S.D. Tex. 1972).

1979) (directors are entitled to "notice of the charges against them and a reasonably prompt post-termination hearing"). Massachusetts General Laws c. 167, § 5 provides that the Commissioner must offer bank directors a hearing before removing them and provides for administrative review of that hearing by the special statutory review board described above. Furthermore, removed directors have a right to seek judicial review of their removal in the Supreme Judicial Court pursuant to Mass. G.L. c. 167, § 5, par. 2 and Mass. G.L. c. 30A, § 14(8) ("The Massachusetts Administrative Procedure Act"). As the Court of Appeals noted, Mass. G.L. c. 167, § 5 is a "constitutionally generous" statute and the petitioners' "facial attack is frivolous" (Pet. 9a).

C. *The Court of Appeals Correctly Ruled that the Proceedings Initiated by the Commissioner of Banks to Remove Certain of the Petitioners from Their Offices in the Petitioner Bank Pursuant to Mass. G.L. c. 167, § 5 Satisfied Due Process.*

There only remains the four individual petitioners' claim against the respondent Commissioner that their removal hearing was conducted in a manner that effectively negated the procedural protections given to them by Mass. G.L. c. 167, § 5. *Cf. Codd* v. *Velger*, 429 U.S. 624, 626-627 (1977). This narrow issue was the only matter as to which the District Court did not grant the respondents' motions to dismiss (Pet. 27a). The District Court subsequently granted the Commissioner's motion for summary judgment (Pet. 11a-14a). The Court of Appeals affirmed. One need look no further than the discussion of the Court of Appeals on this point to determine the propriety of the grant of the respondent Commissioner's summary judgment motion.

There remains only plaintiff's contention that defendant Greenwald so conducted the proceeding as to deny them a fair opportunity to be heard. This claim survived defendants' motion to dismiss. 481 F.Supp. at 755-56. In support of her subsequent motion for summary judgment, Greenwald submitted her affidavit, together with the record of the proceedings. The affidavit summarized the course of events and denied any animus toward the plaintiffs. The record amply refutes the directors' allegations that they were given inadequate notice (a month's formal; nearly two months' informal), and access to evidence and the opportunity to cross-examine witnesses. It also sheds light on their contention that none of the discharged directors was allowed to take the stand except Albert Tobin, who was allowed only one hour. Plaintiffs were repeatedly told they would have four days following the Division's presentation to put on their substantive case. They waited until the fourth day of their witnesses to complain that they themselves had not been heard. The hearing was extended through the following morning; plaintiffs continued with another witness until 11:30 A.M., when Albert Tobin took the stand. His testimony consisted of a 96 page document which he submitted as his statement for the record. None of the others testified. The record abundantly demonstrates that plaintiffs received an adequate opportunity to be heard. How they chose to exercise it was their affair.

Finally, we are surprised, in the light of evidence, that plaintiffs could think they had legitimate complaints against the Commissioner's findings of mismanagement, self-dealing and illegality. The affidavits of Albert Tobin, to the extent that they purport to bear on the issues, are merely conclusory reiterations of the allegations of the complaint, and even at that are often not made on personal knowledge. They are insufficient.

F.R.Civ.P. 56(e). Plaintiffs have failed to show the existence of any genuine issue for trial, and summary judgment was rightly entered.

(Pet. 9a-10a.)

II. The Decision of the Court of Appeals does Not Conflict with Any Decision of This Court.

The petitioners prolix brief fails to demonstrate that the decision of the Court of Appeals is in conflict with any decision of this Court. In absence of such conflict, the petition must be denied. Rule 17.1(c), United States Supreme Court Rules.

Conclusion.

The petition for certiorari must be denied.

Respectfully submitted,

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Dated: July 8, 1981

Appendix A.

MASS. G.L.A. C. 170 APP., § 2-4.

(In Effect on October 28, 1977)

§ 4. Taking Possession of Member Banks by Corporation.

"Whenever it shall appear to the commissioner that any member bank is in an unsound or unsafe condition to transact the business for which it is organized, or that it is unsafe and inexpedient for it to continue to transact such business, he may so certify to the corporation, and upon receipt of such certificate the corporation shall, by notice in writing to the commissioner and to the bank, take possession and control forthwith of the property and business of such bank and shall operate such bank subject to such rules and regulations as the commissioner may impose until the bank shall resume business or until its affairs shall finally be liquidated. The corporation may, while thus carrying on such business, pay to such bank out of the Share Insurance Fund such sums as the corporation's directors deem necessary for the protection of the bank's shareholders, and may order the same to be repaid when no longer required for that purpose, or may purchase assets from said bank to effect the purposes of this chapter on such terms and conditions and at such valuations as the directors, with the approval of the commissioner, may determine." (1934, 73, § 4.)

MASS. G.L.A. c. 167, § 5.

Commissioner May Report and Prosecute Violations of Law; Publication of Certain Facts.

(In Effect in 1977 and 1978)

"If, in the opinion of the commissioner, any officer of any bank, including a director or trustee thereof, has violated any law relating to such bank or has conducted the business of such bank in an unsafe or unsound manner or has used his official position in a manner contrary to the interests of such bank or its depositors or has been negligent in the performance of his duties, the commissioner may, in his discretion, send a statement of facts about such conduct to the executive officer, and each director or trustee of the bank affected. Within such reasonable time as the commissioner may direct, a special meeting of the directors or trustees of the bank shall be held with respect to the statement of the commissioner. If, in the opinion of the commissioner, appropriate action is not taken to protect the interests of the bank or its depositors, or if such conduct is continued, the commissioner shall cause notice to be served on such officer, director or trustee to appear, and show cause why he should not be removed from office. A copy of such notice shall be sent by registered mail to each officer, director or trustee of the bank affected. A copy of such notice shall be sent to a board composed of the state treasurer, the attorney general, and the commissioner of revenue. The members of the board or a duly authorized representative shall be present at any appearance of such officer, director or trustee. If, after granting the officer, director or

trustee so summoned as reasonable opportunity to be heard, the commissioner finds that he has been guilty of any such delinquency, the commissioner, in his discretion, may order that such officer, director, or trustee be removed from office and from participation in the management of such bank. A decision by the commissioner to remove such officer, director or trustee may be reversed by a decision of the majority of the members of the board made within five business days after the commissioner's decision to remove; otherwise, any such decision of the commissioner shall be given full force and effect. Copies of such order shall be served upon the delinquent officer and upon such bank, whereupon such officer shall cease to be an officer of such bank and shall no longer participate in any way in the management thereof provided, that such order and the findings of fact upon which it is based shall not be made public or disclosed to anyone except the delinquent officer and the other officers, directors and trustees of such bank, otherwise than in the course of any judicial proceeding under this section. The commissioner shall thereupon transmit to the attorney general a transcript of the evidence and finding, and the attorney general shall, on behalf of the commonwealth, institute such proceedings as he may deem necessary. Any person removed from office as herein provided who thereafter participates in any manner in the management of any bank in the commonwealth shall be punished by imprisonment in the state prison for not more than five years or by a fine of not more than five thousand dollars, or both.

Within twenty days after the service of an order of removal under this section upon the person removed thereby, he may file a petition in the supreme judicial court for the county of Suffolk for a review of the removal but,

pending such review, the order shall remain in full force and effect. The court shall have jurisdiction in equity to annul, reverse or affirm such order, shall review all questions in accordance with the standards for review provided in paragraph (8) of section fourteen of chapter thirty A and may make any appropriate order or decree. The decision of the court shall be final and conclusive."